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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL T. HAYES,
Petitioner/Appellant,

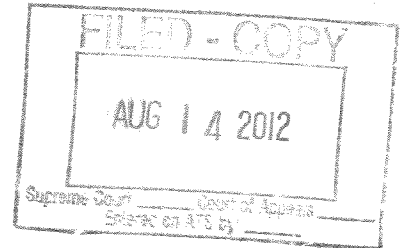
vs.

STATE OF IDAHO,
Respondent.

S.Ct. No. 39543-2012

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Shoshone



HONORABLE FRED M. GIBLER
Presiding Judge

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES	iii
II. STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. General Course of Proceedings in this and Related Cases	1
1. Underlying criminal proceedings	1
2. Kootenai County Motion for New Trial	4
3. Shoshone County Motion for New Trial	6
4. Post-conviction proceedings	6
III. ISSUE PRESENTED ON APPEAL	8
IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO RECONSIDER ITS DENIAL OF MR. HAYES' POST-CONVICTION APPLICATION AFTER HE SUBMITTED ADDITIONAL EXHIBITS THAT WERE WRONGFULLY TAKEN BY PRISON AUTHORITIES	8
A. Mr. Hayes Presented Unique and Compelling Circumstances Justifying Reconsideration of the Order Denying His Post-Conviction Application	10
B. The District Court Abused Its Discretion in Failing to Recognize the Significance of the Additional Evidence Establishing that Mr. Hayes Has Never Had Hepatitis C and How that Evidence Established that He Was Entitled to Post Conviction- Relief	
1. Significance of Hepatitis C evidence	15
2. Exhibits 6 and 7 establish counsel's deficient performance in failing to introduce evidence that Mr. Hayes does not have Hepatitis C during trial	16
3. Exhibits 6 and 7 establish that Mr. Hayes received ineffective assistance of counsel and was deprived of a fair trial due to prosecutorial misconduct	19

C.	Mr. Hayes Was Deprived of His Opportunity to Support His Claim that Trial Counsel Was Ineffective For Failing to Request a Continuance	21
V.	CONCLUSION	23

I. TABLE OF AUTHORITIES

FEDERAL CASES

<i>United States v. Blueford</i> , 312 F.3d 962 (9th Cir. 2002)	19, 20
---	--------

STATE CASES

<i>Abbott v. State</i> , 129 Idaho 381, 924 P.2d 1225 (Ct. App. 1996)	9
<i>Eby v. State</i> , 148 Idaho 731, 228 P.3d 998 (2010)	8, 9
<i>Hayes v. State</i> , 143 Idaho 88, 137 P.3d 475 (Ct. App. 2006)	12
<i>Hays v. State</i> , 132 Idaho 516, 975 P.2d 1181 (Ct. App. 1999)	8
<i>Hernandez v. State</i> , 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999)	9
<i>Mellinger v. State</i> , 113 Idaho 31, 740 P.2d 73 (Ct. App. 1987)	9
<i>Pullin v. City of Kimberly</i> , 100 Idaho 34, 592 P.2d 849 (1979)	8
<i>Rhoades v. State</i> , 148 Idaho 215, 220 P.3d 571 (2009)	8
<i>Schwartz v. State</i> , 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008)	9
<i>State v. Hayes</i> , 144 Idaho 574, 165 P.3d 288 (Ct. App. 2007)	4, 5, 6
<i>State v. Sanchez</i> , 142 Idaho 309, 127 P.3d 212 (Ct. App. 2005)	19

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's order denying Mr. Michael T. Hayes's motion to reconsider the denial of his petition for post-conviction relief.

B. General Course of Proceedings in this and Related Cases

1. Underlying criminal proceedings

In 2002, Mr. Hayes was friends with Nat and Megan, who lived in Shoshone County with Megan's daughters – fifteen-year-old T.L. and fourteen-year-old F.R. Tr. Vol. 1 (30591)¹ p. 54, ln. 15 - p. 55, ln. 7; p. 56, ln. 2-9; p. 156, ln. 3-8; p. 346, ln. 13 - p. 347, ln. 9. On approximately September 2, 2002, T.L. decided to run away from home because she was mad at her parents for reprimanding her for staying out all night. *Id.* at p. 67, ln. 1 - p. 68, ln. 16; p. 97, ln. 15 - p. 98, ln. 6; p. 193, ln. 2 - p. 194, ln. 12; p. 307, ln. 15 - p. 308, ln. 5. With the assistance of her friend, T.L. stole her parents' vehicle in the dead of night and went to Mr. Hayes's residence to request money to run away to Wyoming. *Id.* at p. 195, ln. 4 - 18; p. 309, ln. 3 - p. 310, ln. 25; p. 331, ln. 17 - p. 332, ln. 16. Mr. Hayes refused to give the girls money to run away and, instead, escorted Nat and Megan's vehicle back to their house. *Id.* at p. 201, ln. 22 - p. 202, ln. 9; p. 318, ln. 5-24.

¹ On January 12, 2012, this Court took judicial notice of the appellate record and transcripts of the appeal from the denial of Mr. Hayes's petition for post-conviction relief – Docket Number 36637 – and ordered that the appellate record in this case not duplicate any documents in the previous appeal. In Docket Number 36637, this Court took judicial notice of records in related appeals, including the denial of Mr. Hayes's motion for a new trial in Shoshone County, Docket No. 35482, and the record and transcripts on direct appeal in Shoshone County, Docket No. 30591. *See* R. Vol. 2 (36637) pg. 384. Mr. Hayes is therefore contemporaneously filing a request for judicial notice asking this Court to consider the jury trial transcript in Mr. Hayes's direct appeal, Docket Number 30591. In this Brief, citations to the record and transcripts include the relevant docket number.

T.L. was unhappy with Mr. Hayes for not giving her money to run away to Wyoming. *Id.* at p. 282, ln. 5-13. Instead of going home, T.L. stayed with her friend who was house-sitting for a family that was out of town. *Id.* at p. 199, ln. 8-22.

After learning that her mother had reported her as a runaway and fearing she would be in trouble upon going home, T.L. called dispatch and reported that Nat had been sexually abusing her. *Id.* at p. 199, ln. 15 - p. 200, ln. 7; p. 240, ln. 10 - p. 241, ln. 24. T.L. indicated that the abuse began when she was eight or nine years of age and included a number of sexual acts, including giving her father oral sex. *Id.* at p. 260, ln. 5 - p. 264, ln. 14. In addition to detailed accounts of sexual abuse, T.L. reported that her father had injected her with cocaine. *Id.* at p. 242, ln. 10 - p. 252, ln. 5; p. 260, ln. 5 - p. 264, ln. 15. Nat has hepatitis C. *Id.* at p. 239, ln. 12-13. Tests confirmed that T.L., like Nat, had hepatitis C. *Id.* at p. 239, ln. 7-11. Based on her disclosures of Nat's abuse, T.L. was declared to be in imminent danger and was placed into a foster home. *Id.* at p. 463, ln. 19 - p. 464, ln. 2. T.L. disliked foster care and wanted to return to her parents' home. *Id.* at p. 272, ln. 13-24; p. 468, ln. 17-25.

T.L. therefore indicated that she had lied about Nat sexually abusing her and instead claimed that it was actually Mr. Hayes who sexually abused her and had shot her up with drugs. *Id.* at p. 267, ln. 1 - p. 268, ln. 4; p. 481, ln. 18 - p. 485, ln. 2. T.L. reported a series of alleged sexual encounters with Mr. Hayes over the summer of 2002, including alleged encounters during a camping trip in Kootenai County over the Fourth of July weekend. *Id.* at p. 491, ln. 2 - p. 495, ln. 2. After T.L. changed her story and implicated Mr. Hayes, the detective obtained a warrant authorizing him to seize a sample of Mr. Hayes's blood to determine whether he had hepatitis C. *Id.* at p. 485, ln. 10-14; p. 487, ln. 5-14. The test revealed that Mr. Hayes did not have hepatitis

C at that time and the detective did not seek any further testing. *Id.* at p. 488, ln. 12-17.

The state charged Mr. Hayes in Kootenai County with four counts of lewd conduct with a minor under the age of sixteen, one count for each day of the camping trip over the Fourth of July weekend. *State v. Hayes*, Docket Nos. 30574 and 30591, p. 3 (Ct. App. Jan. 19, 2006) (unpublished)(“*Hayes I*”). The state charged Mr. Hayes in Shoshone County with one count of lewd conduct with a minor on September 2, 2002, which allegedly occurred after T.L. came to his house looking for money to run away. *See id.* The state moved to join the Kootenai and Shoshone County cases and the cases were joined for trial. *Hayes I*, Docket Nos. 30574 and 30591, p. 3. Mr. Hayes was appointed counsel in each case – herein referred to as Shoshone County counsel and Kootenai County counsel or, collectively, “trial counsel.”

During trial, the state presented evidence to the jury that T.L. claimed to have contracted hepatitis C because her boyfriend held her down and shot her up with drugs. Tr. Vol. 3 (30591) p. 134, ln. 14-22. The defense also elicited T.L.’s detailed description through a detective of an occasion when Mr. Hayes supposedly shot her full of drugs. *See id.* at p. 481, ln. 11 - p. 491, ln. 6. To exclude Mr. Hayes as the source of T.L.’s hepatitis and to refute her claim that he injected her with drugs, trial counsel relied entirely on the testimony of the investigating detective and the report generated from the blood test conducted pursuant to the warrant. *See* Tr. Vol. 3 (30591) p. 488, ln. 5-12. Rather than testify that Mr. Hayes does not have hepatitis C as counsel expected, the detective testified that Mr. Hayes should be re-tested because one test could not establish whether a person actually has hepatitis C. Tr. Vol. 4 (36637) p. 176, ln. 17-24.

During closing arguments at trial, Shoshone County counsel argued that both T.L. and Nat have hepatitis C, whereas Mr. Hayes does not. *See id.* at p. 555, ln. 7 - p. 556, ln. 2. Counsel

thus argued that the initial allegations of abuse by T.L.’s father were true and the claims of abuse by Mr. Hayes were false. *Id.* When counsel argued that Mr. Hayes “doesn’t have hepatitis C” the state objected, asserting “that’s not in evidence.” *Id.* at p. 555, ln. 17-20. Then, in rebuttal, the state began by arguing:

[Counsel] talked to you about the fact that [T.L.] has hepatitis C. And, frankly, we don’t know how [T.L.] got hepatitis C. We don’t know whether or not it was from sharing the same razor that her mother and father used or being in a womb with a person who has hepatitis C, her mother. We don’t know how she got it.

But what we also don’t know is whether or not Mr. Hayes has hepatitis C or not. We don’t know that. We know that [the detective] had an initial report that said that he didn’t have hepatitis . . . C, and probably didn’t have hepatitis C but he needed to get that confirmed. And that’s it. You don’t have any other evidence. You don’t have some doctor coming in here and saying, “Mr. Hayes doesn’t have hepatitis C.” So, frankly, that’s not true. We don’t know whether or not Mr. Hayes has hepatitis C.

Id. at p. 575, ln. 10 - p. 576, ln. 1.

Of the Kootenai County charges, the jury acquitted Mr. Hayes on count one – the allegation concerning July 4 – and was unable to reach a verdict on counts two and four – the allegations concerning July 5 and 7. *Hayes I*, Docket No. 30591, p. 4. However, the jury found Mr. Hayes guilty of count three of the Kootenai County counts, concerning the allegation of lewd conduct on July 6, and guilty of the Shoshone County charge. *Id.* The district court imposed concurrent unified forty-year sentences with minimum terms of twenty years. *Id.* On direct appeal, the Court of Appeals affirmed Mr. Hayes’s convictions. *Id.* at p. 10.

2. Kootenai County Motion for New Trial

Before trial, Mr. Hayes’s attorney was unable to locate and contact Thomas Pratt, who had been present during the Fourth of July camping trip in Kootenai County. *State v. Hayes*, 144

Idaho 574, 576, 165 P.3d 288, 290 (Ct. App. 2007) (“*Hayes II*”). After the trial, Mr. Hayes located Tom in Connecticut and moved the court for a new trial based on newly discovered evidence. *Id.* at 576-77, 165 P.3d at 290-91. In support of his new trial motion, Mr. Hayes submitted Tom’s affidavit, in which he stated that he had been with Mr. Hayes “during two of the times when T.L. had testified that the sexual acts occurred, including the alleged incident on July 6, and that the alleged offenses never occurred.” *Id.* at 577, 165 P.3d at 291.

The district court determined that the affidavit constituted newly discovered, material evidence that had been unavailable at trial, despite diligent efforts on the part of the defense. However, the district court concluded there was no probability that the new evidence would produce an acquittal and denied Mr. Hayes’s motion for a new trial. *Id.* Mr. Hayes appealed and on May 22, 2007, the Court of Appeals reversed. *Id.*

After affirming that Tom’s testimony was newly discovered, material evidence and that Mr. Hayes demonstrated diligent efforts to find the witness before trial, the Court of Appeals concluded that the district court erred in denying the motion for a new trial. *Id.* at 578-79, 165 P.3d at 292-93. The Court reasoned:

Given the significance of Pratt’s testimony directly controverting the allegations of an offense on July 6, the fact that T.L.’s mother’s testimony also contradicted T.L.’s claims as to that date, the evidence calling into question T.L.’s general veracity, and the jury’s apparent distrust of much of T.L.’s story, we conclude that the district court erred in determining that the addition of Pratt’s testimony at a new trial would not probably produce an acquittal on the count for which Hayes now stands convicted.

Id. at 580, 165 P.3d at 294.

On remand, the state elected not to re-try Mr. Hayes on the Kootenai County charges. *See* R. Vol. 2 (36637) pg. 356-57.

3. Shoshone County Motion for New Trial

Mr. Hayes had also filed a motion for a new trial in Shoshone County based on Tom's testimony, which the district court stayed pending the outcome of Mr. Hayes's motion in Kootenai County and was renewed after the Court of Appeals reversed in *Hayes II*. *Id.* The district court determined that Tom's testimony constituted newly discovered, material evidence that had been unavailable at trial despite diligent efforts on the part of the defense but denied the motion finding there was no probability the new evidence would produce an acquittal in the Shoshone County case. *State v. Hayes*, Docket No. 35482 (Ct. App. Feb. 17, 2010) (unpublished) ("*Hayes III*"). On appeal, the Court of Appeals concluded that the district court did not abuse its discretion in finding that Tom's testimony primarily refuted the Kootenai County charges and that the use of Tom's testimony would not probably produce an acquittal in the Shoshone County case. *Id.*

4. Post-conviction proceedings

On October 23, 2006, Mr. Hayes filed a pro se application for post-conviction relief alleging that he received ineffective assistance of counsel at trial and sentencing in both the Shoshone and Kootenai County cases. R. Vol. 1 (36637) pg. 1-29. After the state elected not to re-try the Kootenai County charges and the district court denied the motion for a new trial in Shoshone County, Mr. Hayes amended his application for post-conviction relief. *See* R. Vol. 2 (36637) pg. 214-25. Mr. Hayes alleged that he received ineffective assistance of trial counsel for various reasons, including counsel's failure to call witnesses who could have confirmed that Mr. Hayes does not have hepatitis C. R. Vol. 2 (36637), pg. 243. Mr. Hayes also alleged that trial counsel failed to request a continuance based on his medical condition and failed to expose

perjury or object to prosecutorial misconduct. *Id.* at 243-45.

An evidentiary hearing was conducted on April 21, 2009. When Mr. Hayes was transported to the jail for his evidentiary hearing, the Idaho Department of Corrections (“IDOC”) failed to return Mr. Hayes’s legal materials, which he brought with him to assist in presenting his post-conviction case. Tr. Vol. 4 (36637) p. 13, ln. 18 - p. 14, ln. 14. The district court did not order that IDOC return the materials until the day of the evidentiary hearing and Mr. Hayes was thus deprived of those materials during the hearing. *Id.*

After IDOC returned Mr. Hayes’s documents, he moved the district court to augment the record with exhibits unavailable to him at the time of the hearing. R. Vol. 2 (36637) pg. 352-56. Although Mr. Hayes mailed his motion, affidavit and exhibits before the district court issued its decision, the district court did not receive the materials until the day after it issued its memorandum opinion denying Mr. Hayes’s application for post-conviction relief. *Compare id.* at pg. 352 and 355 *with* pg. 356. Mr. Hayes thereafter filed a motion to reconsider, arguing why the wrongfully withheld materials demonstrated that the district court’s opinion was in error. *Id.* at pg. 391-94. The district court did not rule on either Mr. Hayes’s motion to augment or to reconsider.

On appeal from the denial of his petition for post-conviction relief, Mr. Hayes raised several issues, including arguing that the district court’s error in failing to rule on Mr. Hayes’s motions to augment and reconsider required reversal. The Court of Appeals declined to consider this issue because the district court had not ruled on Mr. Hayes’s motion and thus, there was no “adverse ruling” to consider on appeal. *Hayes v. State*, Docket No. 36637, p. 10 (Court of Appeals, April 22, 2011)(unpublished) (“*Hayes IV*”). On October 17, 2011, Mr. Hayes filed a

“Motion to Expedite Ruling on Motion to Amend and Reconsider Memorandum Opinion Order Re: Petition for Post-Conviction Relief. R. (39543) p. 19-20. On November 2, 2011, the district court entered an order denying Mr. Hayes’s motion to reconsider. *Id.* at 25-31. This appeal follows.

III. ISSUE PRESENTED ON APPEAL

Did the district court abuse its discretion in denying Mr. Hayes’s motion to reconsider the denial of his application for post-conviction relief?

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO RECONSIDER ITS DENIAL OF MR. HAYES’S POST-CONVICTION APPLICATION AFTER HE SUBMITTED ADDITIONAL EXHIBITS THAT WERE WRONGFULLY TAKEN BY PRISON AUTHORITIES

On motion and upon such terms as are just, the court may relieve a party from a final judgment or order for any “reason justifying relief from the operation of the judgment.” I.R.C.P. 60(b)(6). The district court may exercise its discretion in granting a motion under Rule 60(b)(6) upon a showing of unique and compelling circumstances justifying relief. *Eby v. State*, 148 Idaho 731, 736, 228 P.3d 998,1003 (2010); *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979). In *Eby*, the Court expanded the circumstances in which Rule 60(b)(6) relief can be granted in post-conviction relief actions because:

we are . . . cognizant that the Uniform Post-Conviction Procedure Act is “the exclusive means for challenging the validity of a conviction or sentence” other than by direct appeal. *Rhoades v. State*, 148 Idaho 215, 217, 220 P.3d 571, 573 (2009) (*quoting Hays v. State*, 132 Idaho 516, 519, 975 P.2d 1181, 1184 (Ct. App. 1999)). Given the unique status of a post-conviction proceeding, and given the complete absence of meaningful representation in the only available proceeding for Eby to advance constitutional challenges to his conviction and sentence, we conclude that this case may present the “unique and compelling circumstances” in which I.R.C.P. 60(b)(6) relief may well be warranted.

Eby, 148 Idaho at 737, 228 P.3d at 1004. Indeed, “failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process.” *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008), *citing Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999); *see also Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996); *Mellinger v. State*, 113 Idaho 31, 35, 740 P.2d 73, 77 (Ct. App. 1987) (Burnett, J., concurring).

Here, IDOC deprived Mr. Hayes of critical documents he had intended to use during the evidentiary hearing and, within a reasonable amount of time following IDOC’s return of those documents, Mr. Hayes asked the district court to consider them in support of his post-conviction relief petition. Unfortunately, Mr. Hayes’s motion and the district court’s opinion crossed in the mail and the district court received Mr. Hayes’s motion and exhibits after it had already denied his petition. When Mr. Hayes realized that his motion to augment had not reached the district court before its ruling, he asked the district court to reconsider its ruling in light of the evidence unavailable to him during the hearing due to IDOC’s actions. These circumstances present unique and compelling circumstances warranting reconsideration.

The district court found there were no unique and compelling circumstances because Mr. Hayes’s motion to augment was untimely instead of recognizing that IDOC’s actions prevented Mr. Hayes from submitting the additional materials to the district court at an earlier date. Further, Mr. Hayes intended to utilize the documents of which he was deprived to support his claims of ineffective assistance of counsel for failing to object to prosecutorial misconduct, to support his claim that he was incapacitated during trial as a result of his post-operative status, to impeach his attorneys’ testimony and to utilize medical records to support his claim that he was incapacitated

during the jury trial. The district court failed to recognize the significance of the additional exhibits and erroneously concluded that they “would not alter the order denying [Mr. Hayes’] request for post-conviction relief.” R. (39543) pg 29.

IDOC’s actions, which prevented Mr. Hayes from utilizing critical documents during the evidentiary hearing, in combination with the district court’s failure to provide any relief from its order denying post-conviction relief, constitutes an unconstitutional deprivation of Mr. Hayes’s due process right to a meaningful opportunity to present his post-conviction claims. Accordingly, the district court abused its discretion in failing to recognize the unique and compelling circumstances that warrant relieving Mr. Hayes from the denial of his petition for post-conviction relief and this Court should reverse the district court’s order denying Mr. Hayes’s motion to reconsider and remand with instruction to grant Mr. Hayes post-conviction relief.

A. Mr. Hayes Presented Unique and Compelling Circumstances Justifying Reconsideration of the Order Denying His Post-Conviction Application

When Mr. Hayes was transported to the Shoshone County Jail before the evidentiary hearing, IDOC refused to allow him access to the box of legal materials that he had prepared to assist him during the hearing. R. Vol. 2 (36637) pg. 300; Tr. Vol. 4 (36637) p. 13, ln. 24 - p. 14, ln. 14. Although Mr. Hayes filed a motion to return his documents a week before the hearing, those materials still had not been returned to him the day of the evidentiary hearing and he was required to proceed without their benefit. Tr. Vol. 4 (36637) p. 14, ln. 2-5. That same day, the district court ordered that the IDOC return Mr. Hayes’s legal materials to him. R. Vol. 2 (36637) pg. 336; Tr. Vol. 4 (36637) p. 14, ln. 15-19.

IDOC did not return Mr. Hayes’s legal materials until May 12, 2009. R. Vol. 2 (36637)

pg. 353, 403. On June 4, 2009, Mr. Hayes provided a pro se motion for augmentation and supporting affidavit to prison authorities for filing with the district court in which he asked the court to consider various materials that had been deprived from him prior to the evidentiary hearing. *See* R. Vol. 2 (36637) pg. 355, 417. The district court did not receive Mr. Hayes's motion and affidavit until June 10, 2009, which was one day after the district court issued its memorandum opinion and order denying Mr. Hayes's application for post-conviction relief. *See Id.* at pg. 352, 356, 402.

In his motion to amend and reconsider, which the district court received on July 17, 2009, Mr. Hayes explained that he had filed his motion to augment pursuant to the prisoner mailbox rule, prior to the district court's decision. *Id.* at pg. 391-92. Mr. Hayes asked the district court to vacate and reconsider its prior ruling since it was made without the benefit of Mr. Hayes's motion to augment and related materials. *Id.* at pg. 393. The district court failed to rule on Mr. Hayes's motion until prompted to do so more than two years later.

These circumstances reveal that Mr. Hayes diligently attempted to provide the district court with the pertinent exhibits. The district court failed to recognize those efforts, finding:

Hayes, at the time of trial, knew that he had the evidence which is the basis of his motion. Hayes advised his counsel of the information prior to the trial. It was discussed at the commencement of the trial. No request was made to continue the trial so it could be presented. No request was made at the trial to augment the record with the proffered evidence. No such request was made in the post-trial briefs. While Hayes did make a pro se motion to augment the record after the trial, it was not timely. The decision denying the petition for post-conviction relief was entered approximately two months after the trial. Hayes appealed the decision denying post-conviction relief. His appellate counsel chose not to seek a stay of the appeal to have the motion decided. Hayes waited until after the appeal was decided to bring to the court's attention that the motion was being pursued. Under these circumstances there are no compelling reasons for granting the relief. A decision to grant the relief would be an abuse of discretion.

R. (39543) 28-29.

Given Mr. Hayes's clear explanation as to when IDOC returned his exhibits, the district court's conclusion that Mr. Hayes should have submitted the exhibits at issue during the evidentiary hearing or post-trial trials is patently unfair. Indeed, according to the billing statement submitted by Mr. Hayes's post-conviction counsel, counsel finished work on the post-hearing brief on May 6, 2009, whereas Mr. Hayes's materials were not returned to him until May 12. R. Vol. 2 (36637) pg. 341, 353, 403. Less than one month after having the box of materials returned to him, Mr. Hayes mailed a motion to augment the exhibits, along with his affidavit, attaching the relevant materials. Given the difficulties facing prisoners filing documents *pro se*,² such as limited ability to make copies for mailing, this relatively short turn around was eminently reasonable.

Moreover, Mr. Hayes filed his motion to augment the record with documents of which he had been deprived of during the evidentiary hearing *prior* to the district court's ruling on his post-conviction application. *Id.* at pg. 352-55. Following receipt of the district court's order on his post-conviction application, Mr. Hayes informed the district court that he had filed his motion to augment under the prisoner mailbox rule³ before the opinion was issued and asked the district court to reconsider its decision based on the additional documents.

² The district court noted that Mr. Hayes had been represented and thus questioned whether it was obligated to consider the motions to augment and reconsider. R. (39543) pg. 27, n.1. However, it is not clear whether counsel's appointment included post-judgment motions and whether his appointment continued after the SAPD was appointed June 16, 2009.

³ Pursuant to the "mailbox rule," an inmate's documents are considered to be filed when they are delivered to prison authorities for the purpose of mailing to the court clerk. *Hayes v. State*, 143 Idaho 88, 91, 137 P.3d 475, 478 (Ct. App. 2006).

Finally, the district court was obligated to rule on Mr. Hayes's motion within a reasonable amount of time after it was filed and, thus, abused its discretion in finding no unique and compelling circumstances because Mr. Hayes "waited until after the appeal was decided to bring to the court's attention that the motion was being pursued." By definition, a motion is a request for an order and both Mr. Hayes's motions to augment and reconsider described the relief he was seeking. *See* BLACKS LAW DICTIONARY, 7th Edition, p. 826 (a "motion" is an "application requesting a court to make a specified ruling). It is thus unclear why Mr. Hayes was obligated to further inform the district court that he actually wanted the judge to rule on the relief described in his motions.

The unlawful deprivation of Mr. Hayes's legal materials, in combination with his attempt to augment the record prior to issuance of the district court's order, justify providing relief from the denial of his post-conviction relief petition under I.R.C.P. 60(b)(6). To not recognize these circumstances as sufficiently compelling to allow reconsideration in light of the new exhibits deprives Mr. Hayes of his due process right to a meaningful opportunity to present his post-conviction relief claims. Accordingly, the district court abused its discretion in failing to recognize the unique and compelling circumstances that warrant relieving Mr. Hayes from the order denying his petition for post-conviction relief.

B. The District Court Abused Its Discretion in Failing to Recognize the Significance of the Additional Evidence Establishing that Mr. Hayes Has Never Had Hepatitis C and How that Evidence Established that He Was Entitled to Post-Conviction Relief

With his motion to augment, Mr. Hayes submitted lab reports indicating that he was negative for hepatitis C, dated August of 1997, May of 2001, and July of 2001; trial counsel's response to the Idaho State Bar following Mr. Hayes's ethical complaint; and a witness list signed

by trial counsel and served on the prosecutor. Exh. 6, 7.⁴ In concluding that these exhibits would not have altered its decision to deny post-conviction relief, the district court found:

Exhibits 6 and 7 are offered to show that Hayes did not have hepatitis C. In the June 9, 2009 order the court found that Hayes's attorneys were not deficient in failing to produce additional evidence that he did not have hepatitis C. This finding was affirmed on appeal.

R. (39543) pg. 29.

However, as Mr. Hayes explained in the motion and affidavit asking the district court to augment the omitted exhibits, Exhibits 6 and 7 would have demonstrated far more than that Mr. Hayes did not have hepatitis C. Instead, these exhibits contradicted trial counsel's evidentiary hearing testimony by establishing that they knew Mr. Hayes had been independently tested for hepatitis C by his treating physicians and that this information was provided to the prosecutor in advance of trial.

Accordingly, these exhibits demonstrate that the district court's basis for denying Mr. Hayes's claim that he received ineffective assistance of counsel for failing to establish that he does not have hepatitis C (and the Court of Appeals' basis for affirming that finding) was erroneous. The exhibits also establish that the prosecutor engaged in misconduct during closing arguments by arguing facts he knew to be false. After considering these exhibits in light of the testimony and record in the underlying criminal proceedings, the district court should have vacated its earlier decision denying post-conviction relief.

⁴ While Mr. Hayes's motion to augment appears in Docket Number 36637, the affidavit and supporting exhibits were exhibits in that appeal and were returned to the district court. R. Vol. 2 (36637) pg. 430. Accordingly, Mr. Hayes is contemporaneously filing a motion to augment the record with those exhibits.

1. Significance of Hepatitis C evidence

At the post-conviction hearing, both Shoshone and Kootenai County counsel testified that they believed that establishing Mr. Hayes does not have hepatitis C was minimally helpful because hepatitis C is transmitted by blood to blood contact instead of through sexual intercourse. Tr. Vol. 4 (36637) p. 113, ln. 11 - p. 114, ln. 15; p. 161, ln. 4-23. Shoshone County counsel also testified at the evidentiary hearing that Mr. Hayes refused to provide him with the names of physicians who could testify that he did not have hepatitis C. Tr. Vol. 4 (36637) p. 111, ln. 4-23. Kootenai County counsel testified that Mr. Hayes never requested an independent test and that counsel did not see any reason for independent testing. Tr. Vol. 4 (36637) p. 160, ln. 14-19.

In affirming the district court's decision to deny relief for trial counsel's failure to establish that Mr. Hayes did not have hepatitis C, the Court of Appeals reasoned: "the district court weighed the testimony of Hayes's attorney and determined that the decision of counsel not to further pursue the hepatitis C issue was strategic and tactical." *Hayes IV*, Docket No. 36637, at p. 7. The district court abused its discretion in failing to recognize that Exhibits 6 and 7 directly refute these findings.

In direct contradiction of Shoshone County counsel's testimony that Mr. Hayes refused to provide the names of his physicians, Exhibit 7 includes a witness list signed by Shoshone County counsel, which included the name of one of the physicians who had tested Mr. Hayes for hepatitis C. *Compare* Exh. 7, p. 3 (listing Dr. Deb Elliot-Pearson) *with* Exh. 6, p. 2-3 (lab reports initialed by DEP). Further, in Kootenai County counsel's response to the Idaho State Bar following Mr. Hayes's ethical complaint, counsel indicated that Mr. Hayes had an independent lab test after being charged that showed that he was negative for hepatitis C but that counsel did not attempt to

admit those results at trial because he did not re-issue a subpoena for the necessary witness. Exh. 6, p. 9, 14. This statement is in direct contradiction to counsel's testimony at the evidentiary hearing in which he indicated that Mr. Hayes never requested an independent test and that counsel did not see any reason for independent testing. Tr. Vol. 4 (36637) p. 160, ln. 14-19.

The district court determined that the decision to forgo additional evidence that Mr. Hayes did not have hepatitis C was strategic without the benefit of the additional documentation that contradicted counsel's testimony explaining that strategic decision. The additional exhibits, of which Mr. Hayes was wrongfully deprived during the evidentiary hearing, were directly relevant to the basis of the district court's findings and the district court therefore abused its discretion in failing to reconsider its decision based on those exhibits.

2. Exhibits 6 and 7 establish counsels' deficient performance in failing to introduce evidence that Mr. Hayes does not have hepatitis C during trial

In denying post-conviction relief, the district court found that trial counsel was not obligated to retain an expert to testify how hepatitis C is transmitted and such evidence was not critical. R. (36637) Vol. 2 pg. 371. Actually, in post-conviction counsel's trial brief, Mr. Hayes argued that "the fact that Michael Hayes is hepatitis C negative was critical to an adequate defense" because it would have supported that T.L. had actually been abused by Nat, not Mr. Hayes. Trial Brief #3, p. 3-4.⁵ Mr. Hayes contended that "the rationales of defense counsel for not testing Mr. Hayes . . . made no sense" and calling the detective "to testify as he did was inadequate representation." *Id.* at. 4. Mr. Hayes also clarified his argument in his augmentation materials, indicating that his own doctors could have testified that he did not have hepatitis C.

⁵ Trial Brief 3 was augmented into Docket Number 36637 on May 14, 2010.

R. (36637) Vol. 2 pg. 400.

Although trial counsel claimed during post-conviction relief proceedings that showing that Mr. Hayes did not have hepatitis C was unimportant, the jury trial proceedings establish that trial counsel actually attempted to show the jury that Mr. Hayes did not have hepatitis C to illustrate that she falsely accused Mr. Hayes to deflect attention away from her actual abuser, Nat and to discredit T.L.'s claim that Mr. Hayes injected her with drugs. *See e.g.* Tr. Vol. 3 (30591) p. 134, ln. 14-22; p. 481, ln. 11 - p. 491, ln. 6; p. 510, ln. 11 - p. 511, ln. 8.

Trial counsel attempted to exclude Mr. Hayes as the source of T.L.'s hepatitis and to refute her claim that he injected her with drugs by relying entirely on the testimony of the investigating detective and the report generated from the blood test conducted pursuant to the warrant. *See* Tr. Vol. 3 (30591) p. 488, ln. 5-12. Rather than testify that Mr. Hayes does not have hepatitis C as counsel expected, the detective testified that Mr. Hayes should be re-tested because one test could not establish whether a person actually has hepatitis C. Tr. Vol. 4 (36687) p. 176, ln. 17-24.

During closing arguments at trial, Shoshone County counsel argued that both T.L. and Nat have hepatitis C whereas Mr. Hayes does not. *See id.* at p. 555, ln. 7 - p. 556, ln. 2. Counsel thus argued that the initial allegations of abuse by T.L.'s father were true and the claims of abuse by Mr. Hayes were false. *Id.* However, because counsel attempted to establish that Mr. Hayes did not have hepatitis C through the detective, the prosecutor argued that no one knew whether Mr. Hayes had the disease. *Id.* at p. 575, ln. 10 - p. 576, ln. 1.

At the evidentiary hearing in the post-conviction case, trial counsel admitted that he failed to recognize that the report from the blood test, about which he questioned the detective during trial, could be interpreted as inconclusive even though the report indicated that a negative result

“does not exclude the possibility of exposure to or infection with” hepatitis C. Tr. Vol. 4 (36687) p. 169, ln. 14 - p. 170, ln. 6; 173, ln. 9-12; p. 178, ln. 10-13; Exh. 4, (4-21-09). Counsel additionally admitted that he made the “unfortunate mistake” of not having his investigator interview the detective prior to trial and instead spoke with the detective himself. Tr. Vol. 4 (36637) p. 176, ln. 22-23. Thus, when the detective’s answers to counsel’s questions on the witness stand were different than those he gave during his interview with counsel prior to trial, counsel was unable to impeach him with his prior statements. *Id.* at p. 176, ln. 18-24.

Exhibits 6 and 7 establish that trial counsel possessed lab reports verifying that Mr. Hayes did not have hepatitis C and that they had disclosed Mr. Hayes’s medical provider, who had conducted that testing, as a witness. According to Kootenai County counsel’s response to the bar complaint, the medical provider was not called because counsel did not re-issue the subpoena.

There is no apparent tactical reason to attempt to introduce evidence that Mr. Hayes did not have hepatitis C through the detective’s preliminary report when trial counsel could have simply subpoenaed Mr. Hayes treating medical provider to discuss pre-existing testing. Exhibits 6 and 7 establish that trial counsel knew of a witnesses who could provide the necessary testimony and instead made the admittedly risky choice to rely on the detective. Further, although trial counsel testified during post-conviction proceedings that it was unimportant to establish that Mr. Hayes did not have hepatitis C, the jury trial proceedings reveal that whether Mr. Hayes had hepatitis C was heavily disputed and that definitive proof that Mr. Hayes did not have the disease would have resulted in a different outcome. Accordingly, the district court abused its discretion in failing to appreciate the significance of the additional exhibits and in failing to reconsider its denial of post-conviction relief based on those exhibits.

3. Exhibits 6 and 7 establish that Mr. Hayes received ineffective assistance of counsel and was deprived of a fair trial due to prosecutorial misconduct

The lab reports combined with the witness list and trial counsel's statement that he had disclosed those reports to the prosecutor would have established that the prosecutor had actual knowledge that Mr. Hayes did not have hepatitis C. These materials thus establish that prosecutorial misconduct deprived Mr. Hayes of his federal due process right to a fair trial and that trial counsel was ineffective for failing to object to the misconduct. *See also* R. (36637) 404-06.

When counsel argued that Mr. Hayes "doesn't have hepatitis C" the state objected, asserting "that's not in evidence." *Id.* at p. 555, ln. 17-20. Then, in rebuttal, the state began by arguing:

[Counsel] talked to you about the fact that [T.L.] has hepatitis C. And, frankly, we don't know how [T.L.] got hepatitis C. We don't know whether or not it was from sharing the same razor that her mother and father used or being in a womb with a person who has hepatitis C, her mother. We don't know how she got it.

But what we also don't know is whether or not Mr. Hayes has hepatitis C or not. We don't know that. We know that [the detective] had an initial report that said that he didn't have hepatitis . . . C, and probably didn't have hepatitis C but he needed to get that confirmed. And that's it. You don't have any other evidence. You don't have some doctor coming in here and saying, "Mr. Hayes doesn't have hepatitis C." So, frankly, that's not true. We don't know whether or not Mr. Hayes has hepatitis C.

Id. at p. 575, ln. 10 - p. 576, ln. 1.

The government's fundamental interest in criminal prosecutions is not to win a case but, rather, ensure that justice is done. *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002); *State v. Sanchez*, 142 Idaho 309, 322, 127 P.3d 212, 225 (Ct. App. 2005). As the Ninth Circuit held:

[i]t is certainly within the bounds of fair advocacy for a prosecutor, like any lawyer, to ask the jury to draw inferences from the evidence that the prosecutor believes in good faith might be true. But it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt.

Blueford, 312 F.3d at 968. In *Blueford*, the prosecutor's actions in asking the jury to infer that the defendant fabricated his alibi in certain telephone calls with witnesses in the weeks just before the trial, when in fact the government had evidence contradicting some of its assertions, required a new trial. *Id.* at 963-64.

Similarly, although the defense neglected to call a witness who could testify about the additional negative hepatitis C tests, the prosecutor had those reports in his possession. The prosecutor nevertheless argued to the jury that it was "not true" that "we don't know whether or not Mr. Hayes has hepatitis C." Tr. Vol. 1 (30591) p. 575, ln. 10 - p. 576, ln. 1. The difference between a lawyer asking the jury to infer facts that he believed in good faith might be true and making factual assertions he well knows are untrue reflects the difference between fair advocacy and misconduct. *See Blueford*, 312 F.3d at 968.

Given that the prosecution had been provided multiple lab reports demonstrating that Mr. Hayes was *not* positive for hepatitis C, the prosecutor could not have entertained a good faith belief that it was actually unknown whether Mr. Hayes had hepatitis C, regardless of whether his argument accurately reflected the evidence at trial. Accordingly, the prosecutor's argument constituted misconduct and trial counsel rendered deficient performance in neglecting to object. Without his copies of the lab reports and counsel's statement to the bar indicating he had provided lab reports to the prosecution, Mr. Hayes was unable to prove this claim.

The unlawful seizure of Mr. Hayes's legal materials thus deprived him of his due process

right to a meaningful opportunity to present his post-conviction claims. The district court abused its discretion by not curing the constitutional defect and vacating the denial of his post-conviction relief petition after reconsidering his claims in light of the additional evidence.

C. Mr. Hayes Was Deprived of His Opportunity to Support His Claim that Trial Counsel Was Ineffective For Failing to Request a Continuance

With his affidavit in support of his motion to augment, Mr. Hayes attached an operative report dated August 21, 2003, describing his back surgery and order for home health dated August 23, 2003, which indicated that Mr. Hayes would require assistance with all activities of daily living. Exh. 5, p. 3. Mr. Hayes also submitted documentation of prescriptions for the medications prescribed following surgery, which Mr. Hayes testified at the evidentiary hearing caused him to feel extremely drowsy and unable to function during the jury trial. *Id.* at p. 5-9.

Mr. Hayes explained that he had intended to use these documents to support his claim that pain and the effects of medication rendered him incapacitated during his jury trial. In denying this claim, the district court relied on counsels' testimony that they did not observe any concentration problems and concluded that Mr. Hayes failed to meet his burden of persuasion. R. Vol. 2 (36637) pg. 370. The aforementioned medical records would have supported Mr. Hayes's claim by providing objective evidence that verified his condition and the medication he had been taking. Accordingly, Mr. Hayes was deprived of a meaningful opportunity to prove his claim that trial counsel should have moved to continue the trial as a result of his medical condition.

In concluding that this evidence would not have altered its decision to deny post-conviction relief, the district court found that:

Exhibit 5 is offered to show that Hayes was under post-operative care and was taking medications at the time of trial of the criminal case. Whether Hayes

was taking medication was not an issue. The issue was whether his attorneys were deficient in not requesting a continuance because of his medical condition. Consideration of exhibit 5 does not change the fact that Hayes's attorneys, and the court, did not notice any problems from Hayes's medication, and he failed to inform his attorneys of any problems from his medication.

R. (39543) 29.

However, evidence of the exact nature of the medications Mr. Hayes was taking and the level of after-care he needed should have caused the district court to reconsider its prior ruling. Indeed, Exhibit 5 establishes that Mr. Hayes must have been impacted by the medications and post-operative care and, therefore, the court and counsel must be incorrect in believing Mr. Hayes did not exhibit any difficulty paying attention during trial.

Further, the district court failed to recognize how the exhibits impeaching trial counsel's testimony would have assisted this claim. In rejecting Mr. Hayes's claims that counsel was ineffective for failing to request a continuance based on Mr. Hayes's medical condition and failing to call Mr. Hayes as a witness, the district court determined that the attorneys' testimony was more credible than that of Mr. Hayes. R. Vol. 2 (36637) pg. 370. Shoshone County counsel's witness list and Kootenai County counsel's response to the Bar could have been utilized to impeach the attorneys' credibility or their ability to accurately recall the events at issue. Such an examination could have led the district court to make different credibility determinations, thus resulting in Mr. Hayes being granted relief on his claim that counsel prevented him from testifying. Additionally, the ability to properly cross-examine counsel, in combination with the additional medical and medication records regarding Mr. Hayes's surgery, could have led the district court to find in Mr. Hayes's favor on his claim that counsel should have moved to continue the trial based on his medical condition. The district court therefore abused its discretion

in failing to reconsider its decision based on the exhibits submitted by Mr. Hayes.

V. CONCLUSION

IDOC deprived Mr. Hayes of critical documents he had intended to use during the evidentiary hearing and, within a reasonable amount of time following IDOC's return of those documents, Mr. Hayes asked the district court to consider them in support of his post-conviction relief petition. When Mr. Hayes realized that his motion to augment had not reached the district court before its ruling, he asked the district court to reconsider its ruling in light of the evidence unavailable to him during the hearing due to IDOC's actions. IDOC's wrongful act in taking Mr. Hayes's materials, combined with his diligent efforts to provide those documents to the district court, present unique and compelling circumstances warranting reconsideration.

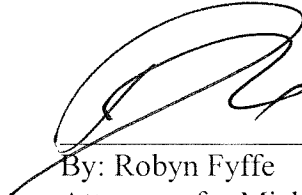
Moreover, the additional exhibits establish that trial counsel was ineffective for not establishing that Mr. Hayes is negative for hepatitis C through his medical provider and contradict the reasons counsel gave during post-conviction proceedings to explain why such evidence was offered. These exhibits also establish that Mr. Hayes is entitled to post-conviction relief by demonstrating that the prosecutor knew Mr. Hayes did not have hepatitis C and corroborating his statements regarding his medical condition during trial.

IDOC's actions, which prevented Mr. Hayes from utilizing critical documents during the evidentiary hearing, in combination with the district court's failure to provide any relief from its order denying post-conviction relief, constitutes an unconstitutional deprivation of Mr. Hayes's due process right to a meaningful opportunity to present his post-conviction claims.

Accordingly, Mr. Hayes respectfully asks this Court to reverse the district court's order denying his motion to reconsider and to remand this case to the district court with instruction to grant Mr. Hayes post-conviction relief.

Respectfully submitted this 14 day of August, 2012.

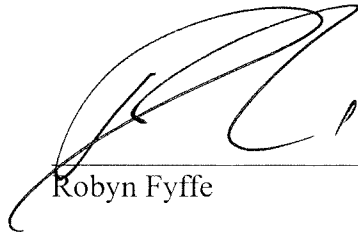
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By: Robyn Fyffe
Attorneys for Michael T. Hayes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of August, 2012, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.



Robyn Fyffe